Interactive Communications International, Inc. d/b/a INCOMM *and* Karina Nilda Rodriguez. Case 12–CA–155362

October 19, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On March 22, 2016, Administrative Law Judge Keltner W. Locke issued the attached decision. The General Counsel and the Respondent both filed exceptions, supporting briefs,[1] and answering briefs.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Interactive Communications International, Inc. d/b/a INCOMM, Jacksonville, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from discussing wages, hours or other terms and conditions of employment with other employees while on the Respondent's property.

(b) Threatening employees with discharge if they discuss wages, hours or other terms and conditions of employment with other employees while on the Respondent's property.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Jacksonville, Florida facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 25, 2015.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. October 19, 2016

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Mark Gaston Pearce, Chairman

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Philip A. Miscimarra, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] The Respondent's unopposed motion to correct the transcript is granted.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, *Inc.,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(1) during a June 24, 2015 meeting by prohibiting employees from complaining to management about hours of work and other terms and conditions of employment on behalf of other employees and by directing employees to make such complaints only to supervisors.

[3] We shall modify the judge's recommended Order to conform to the violations found and to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit you from discussing wages, hours or other terms and conditions of employment with other employees while on our property.

WE WILL NOT threaten you with discharge if you discuss wages, hours or other terms and conditions of employment with other employees while on our property.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

INTERACTIVE COMMUNICATIONS INTERNATIONAL, INC. D/B/A INCOMM

The Board's decision can be found at www.nlrb.gov/case/12–CA–155362 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Caroline Leonard, Esq., for the General Counsel.
James M. Walters, Esq. (Fisher & Phillips, LLP), of Atlanta, Georgia, for the Respondent.
Ms. Karina Rodriguez, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. Respondent violated Section 8(a)(1) of the National Labor Relations Act by prohibiting an employee from discussing working conditions with other employees at any time while on company property. However, it did not violate the Act in any other manner alleged in the complaint.

Procedural History

This case began July 6, 2015, when the Charging Party, Karina Nilda Rodriguez, filed an unfair labor practice charge against the Respondent, Interactive Communications International, Inc. d/b/a INCOMM. The Board docketed this charge as Case 12–CA–155362 and began an investigation.

On October 29, 2015, the Regional Director for Region 12 of the Board issued a complaint and notice of hearing alleging that the Respondent had violated Section 8(a)(1) of the Act. In doing so, the Regional Director acted for, and with authority delegated by the Board's General Counsel (referred to below as the General Counsel or the Government).

On December 22, 2015, the General Counsel amended the complaint. (For brevity, I will refer to the complaint and notice of hearing, as amended, as the complaint.) The Respondent filed timely answers to the complaint and to the amendment. (For brevity, I will refer to the answer, as amended, simply as the answer.)

On January 13, 2016, a hearing opened before me in Jacksonville, Florida. Both the General Counsel and the Respondent presented evidence. After the hearing closed, the parties submitted briefs, which I have carefully considered.

Admitted Allegations

Based on the admissions in the Respondent's answer to the complaint, I find that the General Counsel has proven the allegations in complaint paragraphs 1, 2(a), 2(b), 2(c), 2(d), 2(e), and portions of paragraph 3. More specifically, I find that the Charging Party filed and served the charge as alleged.

Further, I find that at all times, the Respondent has been a Florida corporation with offices and a place of business in Jacksonville, Florida, and has been engaged in the business of servicing prepaid gift cards, reloadable debit cards, incentive and promotional programs, and providing bill payment and postpaid subscriber services to customers in the United States, Puerto Rico, and Canada. Additionally, I conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that it is appropriate for the Board to assert jurisdiction in this matter.

The Respondent has admitted, and I find, that the following individuals are its supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act: Corporate Human Resources Manager/Employee Relations Klea Jackson; Employee Relations and Development Manager Patricia Kitler; Customer Care Manager Kelly Liles; Director Debra Ray; and Senior Manager Eugenio Robleto.

Credibility

The complaint alleges that Respondent's managers made four statements which interfered with, restrained or coerced employees in the exercise of rights guaranteed by Section 8(a)(1) of the Act. It alleges no other violations.

According to the Government, these alleged violations occurred in meetings with Charging Party Rodriguez on June 24 and 25, 2015. Although more than two people attended these meetings, only two witnesses testified: Charging Party Rodriguez and Respondent's Employee Relations and Development Manager Patricia Kitler.

Respondent has admitted that the other persons who attended these meetings, but who did not testify, were its managers. In the absence of evidence that any of these individuals had disappeared or otherwise had become unavailable, I will assume that the Respondent could have called them as witnesses. Moreover, because they were Respondent's managers, I will assume that Respondent had the opportunity to speak with them and learn how they would testify if called to the witness stand.

Because the Respondent could have called them but did not, I will presume that their testimony would not have contradicted that given by Charging Party Rodriguez. However, that presumption does not answer the question of how much weight I should give to Rodriguez' testimony because the Board does not have to credit testimony, even if it is uncontradicted, when sufficient reason exists to doubt its reliability. *Sioux City Foundry Company*, 323 NLRB 1071 (1997).

Testimony of the two witnesses, Rodriguez and Kitler, disagreed little as to the facts. The differences in their testimony more concerned which facts to emphasize rather than what happened. Therefore, in general I credit both witnesses. To the extent that their testimony conflicts, I credit Kitler, who had better recollection.

Rodriguez acknowledged that her memory was limited and I found her testimony to be somewhat sketchy.[1] Additionally, I believe that Rodriguez' interest in the outcome of this proceeding, which began with the unfair labor practice charge she filed, may have made her testimony a bit partisan.

Tension arises between the fact that no employees had requested that Rodriguez speak on their behalf and her claim to management that she was speaking for other employees. If Rodriguez lacked candor in her statements to management, it could affect her credibility as a witness.

In discussing the tension between her claim to be representing other employees and the fact that none had asked her to do so, it should be noted that the complaint does not allege that Respondent discriminated against Rodriguez because of her protected, concerted activities. Moreover, the Respondent did not discipline Rodriguez in any way.

Thus, the Government does not have to prove that Rodriguez engaged in protected activity to make its case.[2] Whether Rodriguez engaged in protected activity would have no legal relevance except for the General Counsel's argument, discussed below, that the existence of such protected activity affects how an employee reasonably would understand what the managers said.[3]

Here, in this discussion of credibility, the issue of protected activity is relevant because Rodriguez seemed eager to prove that she had engaged in protected activity and this intent may have affected her candor as a witness. When asked squarely on cross–examination whether other employees had asked her to speak for them, Rodriguez admitted that they had not. However, it appears that during her meetings with managers, Rodriguez tried to create the impression that employees had, in fact, requested her to do so.

For example, she refused to identify employees who had asked her to represent them, which foreseeably would lead hearers to believe that there were such employees and that she was trying to protect them from retaliation. Such artifice would suggest a conscious intention to deceive. Therefore, it would significantly erode her credibility as a witness.

Additionally, Rodriguez' testimony sometimes went from sketchy to self-contradictory. In the following portion of her cross-examination, Rodriguez first admits that no employees asked her to represent them, but then implies there were such employees:

THE WITNESS: No one asked me to speak on behalf of them.

> Q. BY MR. WALTERS: No one asked you -- and Ms. Kitler asked you who they were, and you wouldn't give her any names, right?
>
> A. I refused to give her any names because I wasn't going to point people out.
>
> Q. Did you have anybody in mind?
>
> A. Yes.
>
> Q. Who did you have in mind?

[1] For example, at one point, the General Counsel asked Rodriguez if, during the June 24, 2015 meeting, she mentioned the National Labor Relations Board. She testified that she did but could provide little detail about what she had said. At another point, when asked if she recalled any other specific words Kitler had used during the meeting, Rodriguez answered "I'm trying to remember, but it was 6 months ago."

[2] Because the General Counsel need not prove that Rodriguez engaged in protected concerted activity, resolving the issues raised by the complaint does not require me to address that question. However, the Respondent's brief rather vigorously argues that Rodriguez did not engage in protected concerted activity, so it is appropriate here to note, in passing, my disagreement with that argument.

The Board has consistently defined concerted activity as encompassing the lone employee who is acting for or on behalf of other workers, or one who has discussed the matter with fellow workers, or one who is acting alone to initiate group action, such as bringing group complaints to management's attention. *Kvaerner Philadelphia Shipyard*, 346 NLRB 390 (2006), citing *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Meyers Industries (II)*, 281 NLRB 882 (1986); *Globe Security Systems*, 301 NLRB 1219 (1991); and *Alaska Pulp Corp.*, 296 NLRB 1260 (1989), enfd. 944 F.2d 909 (9th Cir. 1991). The present record clearly shows that Rodriguez falls within the definition of an employee acting alone to initiate group action.

[3] Stated another way, the General Counsel argues that certain statements which may appear benign in isolation take on a different meaning, and therefore communicate a different and violative message, in the context of protected activity.

A. I'm still not going to point people out. I can point one person out because she's no longer working there.

Q. Jamal Pridgen?

A. No. I don't know who that is. Her name was Victoriya Minasova.

Thus, in a brief time, Rodriguez both denied that any employees had asked her to represent them and then mentioned the name of one who had. Her further testimony increased rather than resolved this confusion. The Respondent's counsel asked Rodriguez whether a specific employee, Fiorella Caples, had asked her to speak on his behalf:

Q. BY MR. WALTERS: Yes or no?

A. Fiorella Capeles is still working at the Company.

Q. That doesn't answer the question. Yes or no, were you speaking on behalf of Mr. Capeles?

A. Well, like I said before, I was speaking on behalf of--

Q. Yes or no?

A. Yes, because I was speaking on behalf of all of the employees.

Q. Even though Mr. Capeles didn't authorize you or ask you to speak in his behalf?

A. Yes.

Q. Okay. So the answer is nobody in particular, nobody authorized you, but you're sort of self-deputizing yourself to speak on behalf of everybody?

A. Not exactly.

The testimony quoted above is confusing, but one fact appears clear. When Manager Kitler asked Rodriguez which employees had asked her to speak for them, she replied, in effect, that she would not name them. A more candid answer would have been that there were no such employees.

It concerns me that this apparent lack of candor may have carried over into Rodriguez' testimony at hearing. On the witness stand she said "I'm still not going to point people out." However, I hesitate to conclude that this testimony reflected an attempt to deceive because she also admitted that no one had asked her.

Yet, this tension would be consistent with a conclusion that she wanted to put a particular "spin" on her testimony but would stop short of outright lying. In any event, it is difficult to resist suspecting at least some inclination towards equivocation.

When asked whether she had deputized herself to speak for other employees, Rodriguez answered "not exactly," which did not resolve the confusion. Another part of her testimony on cross-examination suggests that Rodriguez had, in fact, appointed herself representative because no one else had:

Q. Now, at some point Ms. Kitler asked you who else needed their scorecards that you were speaking for.

A. Uh-huh.

Q. And you didn't give her any names, right?

A. No. I didn't.

Q. Okay. Approximately how many people were you speaking on behalf of?

A. Quite a few.

Q. Can you give me a number?

A. No, because I was -- it wasn't just for those few people. It was for the entire call center. It wasn't just for them.

Q. Nobody in particular--no body asked you to raise the issue, did they?

A. No one asked me, no.

As noted above, Rodriguez clearly was engaged in protected activity when she sought to enlist the support of other employees and speak for them about working conditions, but such protected activity is not an element of the Government's proof in the present case. However, to the extent that Rodriguez implies that some employees had specifically authorized her to speak for them, it creates confusion in her testimony and raises doubts about her reliability as a witness.[4]

Even though Rodriguez' testimony generally is consistent with that of Kitler, and even though I presume that the managers who did not testify would not have contradicted Rodriguez, the doubts about her testimony described above make me cautious. To the extent Rodriguez' testimony conflicts with Kitler's, I credit Kitler's, which I believe more reliable.

Contested Allegations

Background

The complaint alleges that the Respondent's supervisors made unlawful statements on two occasions. The first occasion was in a meeting with an employee, Charging Party Rodriguez, on June 24, 2015. The second occasion was in another meeting with Rodriguez the following day. Before examining those allegations, some background information will be helpful.

The Respondent operates a call center in Jacksonville, Florida. It employs about 260 or 270 customer service representatives, who assist callers with problems related to debit and gift cards. Because the Respondent operates the call center 24 hours a day, 7 days a week, some customer service representatives are present and on duty at all times.

Because of the call center's continuous operation, there are a number of different shifts. Employees compete for the shifts they desire by submitting bids. They have one opportunity each year to bid. In 2015, the period for submitting bids began in late June.

Whether or not an employee receives her desired shift depends on her job performance. In ranking the employees by

[4] On cross-examination, the Respondent asked Rodriguez if she knew a former employee, John Barnett. She denied knowing him. The parties disagree about whether Rodriguez answered this question truthfully. However, the evidence concerning this collateral matter falls short of persuading me that Rodriguez intentionally gave a false answer while testifying. Here, I reach no conclusion about whether Rodriguez knew Barnett, and this issue does not figure in my credibility analysis. Therefore, I decline the Respondent's invitation to take judicial or administrative notice of the dismissal letter, in a case unrelated to the present one, attached to the Respondent's brief.

performance, management assigns each employee points based on "scorecards"—monthly evaluations—maintained by supervisors. Each employee must go to her supervisor to see her scorecard, which now is kept in digital form. However, the Respondent posts the point rankings, for all employees to see, before the bidding period opens.

On Friday, June 19, 2015, management posted the employee rankings. The bidding process would open 5 days later. An employee concerned about her rank on the list could go to her supervisor and ask to see the scorecards on which the ranking was based.

On Monday, June 22, 2015, Charging Party Rodriguez sent an email to Employee Relations and Development Manager Patricia Kitler. In this email, Rodriguez mentioned that, in the past, there had been mistakes in calculating her point ranking, but that she had not had enough time before the bidding to review her scorecards and find the miscalculations. She told Kitler, "I want to make sure this doesn't happen to others, that they are unable to correct mistakes until the shift bid has passed."

Her email asked Kitler"if its possible that you may be able to do anything to ensure that the 101 employees involved in the shift bid receive their score cards and have an opportunity to review these for errors." Rodriguez did not ask Kitler to take any specific action, but just stated "I hope there is something that you can do or that can be done before the shift bid begins on Wednesday."

Kitler replied the next day. Her email referred to "Kelly," meaning Customer Care Manager Kelly Liles, who was the supervisor of Rodriguez' immediate supervisor. Kitler's email stated:

> Kelly will set up a time to meet with you to review your ranking. Others with concerns will be handled in the same manner by their supervisor or manager.
>
> Rodriguez' reply indicated that she had spoken to Liles, but to no avail. Her email stated:
>
> > I asked Kelly he referred me to my sup and she hasn't had anytime I asked to speak with her several times there was no time. If we are all too busy it doesn't seem anyone will have coaching time for 110 people

Kitler replied to this email 9 minutes after receiving it. Although this response began on a sympathetic note, it really did not address either of the matters raised by Rodriguez. In essence, Rodriguez had let Kitler know that Liles was not doing what Kitler had said he would do. Instead of scheduling a time to meet with Rodriguez, Liles had brushed her off by telling her to talk to her supervisor, a supervisor who was too busy to talk.

In her email, Rodriguez also expressed fear that other employees similarly would be brushed off. ("If we are all too busy it doesn't seem anyone will have coaching time for 110 people.") Kitler's reply began by paying lip service to Rodriquez' concerns and then ignored them:

> I understand and appreciate your concerns. I spoke to Kelly before I sent you the last email and he assured me he would speak to you today.

Perhaps a student of bureaucratic finesse would admire how deftly Kitler had passed the buck, attributing the problem to Liles (who had "assured me he would speak to you today") but offering no help in solving it. In other people, Kitler's email reasonably could elicit some degree of frustration, but Rodriguez replied quite patiently:

> Oh ok thank you Trish I really appreciate your help. But I am still concerned over others that have not received their score cards and will still be waiting because they aren't fortunate enough to sit next to their manager or know where to turn. Is it possible for a pop up to be sent to let employees know they can ask for their cards[?]

A "pop up" presumably is a message that pops up on the computer screens of the customer service representatives. Notwithstanding the polite tone of Rodriguez' request, Kitler did not answer the email. At least, the record does not reveal such an answer and I infer that Kitler simply ignored Rodriguez' request, perhaps hoping that the matter simply would go away.

It didn't. Receiving no answer, and no pop up, Rodriguez sent a message about the scorecards to other customer service representatives. She used the computer system which had been set up to store information obtained by the representatives as they talked with customers.

The computer system works in this way: When a customer calls with a problem concerning a debit or gift card, the representative opens a "ticket" and enters information provided by the customer. Other employees may need to gain access to this information to solve the customer's problem, so each "ticket" has a unique number which can be used to find it in the system. Once an employee has located the "ticket" using this number, she may add further information to it by making a "comment."

Rodriguez created such a ticket, which bore the number 606742. She placed this message in it:

> If you're included in the MANDATORY SHIFT BID please notate below your need for score cards for any or all of the months being evaluated (November-April) before the shift bidding begins.

Thus, she was inviting other employees to let her know if they needed to examine their scorecards to check the rankings they had been assigned. She could then provide this information to management.

Creating the "ticket" in the computer system did not assure that any other employee would know that it was there. It was not a "pop up" and would not appear automatically on other workers'computer screens. To inform employees that the "ticket" existed, Rodriguez posted signs in the break room and stairwell. These signs stated:

606742
Comment for
your scorecards
Months Evaluated Nov-April (for shift bids)

Rodriguez wrote similar information on a slip of paper, which she left in the break room. The signs did not result in any employees leaving "comments" on the ticket but they did

get the attention of managers, who called Rodriguez into meetings on June 24 and 25, 2015. The Government alleges that the managers made unlawful statements to Rodriguez at each of these meetings.

Complaint Paragraph 4(a) and 4(b)

Sometime in the morning on June 24, 2015, Senior Manager Eugenio Robleto came to Rodriguez' cubicle and summoned her to a meeting in the office of Customer Care Manager Kelly Liles. Complaint paragraphs 4(a) and 4(b) concern statements allegedly made at this meeting.

More specifically, complaint paragraph 4(a) alleges that on or about June 24, 2015, the Respondent, by Patricia Kitler, at its Jacksonville, Florida call center, prohibited employees from complaining to management about hours of work and other terms and conditions of employment on behalf of other employees. Complaint paragraph 4(b) alleges that on or about June 24, 2015, the Respondent, by Patricia Kitler, at its Jacksonville, Florida call center, directed employees to make complaints about hours of work and other terms and conditions of employment only to supervisors.

The Respondent denies both allegations. It also denies the conclusion, alleged in complaint paragraph 6, that it thereby violated Section 8(a)(1) of the Act. Additionally, it denies the conclusion, alleged in complaint paragraph 7, that the alleged unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

In addition to Rodriguez, Senior Manager Robleto, Customer Care Manager Liles and Employee Relations and Development Manager Kitler took part in this meeting, although Liles left for part of it. The Respondent has admitted that Robleto, Liles and Kitler are its managers and supervisors within the meaning of Section 2(11) and Section 2(13) of the Act.

According to Rodriguez, Senior Manager Robleto spoke first, telling her that hanging the posters violated the Respondent's no solicitation/distribution policy.[5] Rodriguez disagreed, adding that, regardless of whether it was a solicitation, she did not hang the posters in work areas or during her working time.

Rodriguez described the meeting as going "round and round in circles." She testified that at one point, she mentioned the National Labor Relations Board:

> Q. And do you recall what you said about it?
> A. I'm trying to remember I don't remember my exact words
>
> Q. What do you recall?
> A. I remember saying that I had the right to speak on behalf of the other employees

According to Rodriguez, Employee Relations and Development Manager Kitler responded that Rodriguez "wasn't an elected representative of the employees." Rodriguez further testified as follows:

> Q. BY MS. LEONARD: Okay. Did there come a time during the meeting when you explained why you had hung the posters in the break room?
> A. Yes.
>
> Q. And what did you say about that?
> A. I explained that I wanted to make sure that everyone got their scorecards.
>
> Q. Why was that important? Did you explain that in the meeting?
> A. When I needed to.
>
> Q. Okay. Was there any response to that comment that you -- about why you had posted the scorecards—the posters?
> A. Yes, they said that if other employees wanted their scorecards—
>
> Q. Which person said that?
> A. Sorry, Patricia Kitler said if someone wanted their scorecards, they would need to go through their supervisors.
>
> Q. Okay. Do you recall any other specific words that Ms. Kitler used during the meeting?
> A. I'm trying to remember, but it was 6 months ago.

Kitler's testimony generally supports rather than contradicts that of Rodriguez. On cross-examination, Kitler testified, in part, as follows:

> Q. Ms. Kitler, isn't it true that during your meeting with Mr. Liles, Mr. Robleto, and Ms. Rodriguez on June 24th, that Ms. Rodriguez raised the point that she was speaking not only for herself but on behalf of other employees as well?
> A. Yes.
>
> Q. And isn't it true that you asked her if she was speaking on behalf of anyone specifically?
> A. Yes.
>
> Q. Didn't she say she was speaking on behalf of all the CSRs [customer service representatives]?
> A. Yes.
>
> Q. Didn't you remind her about the problem-solving policy of the Employer?
> A. I did, yes.
>
> Q. And doesn't the problem-solving policy direct employees to bring all of their issues to management?
> A. Yes.
>
> Q. Didn't Ms. Rodriguez say that not everybody may be comfortable voicing their opinion?
> A. Yes. She did.

It is not obvious how the testimony of either Rodriguez or Kitler proves the allegations raised by complaint paragraphs 4(a) and 4(b). Complaint paragraph 4(a) alleges that the Respondent prohibited employees from complaining to management about conditions of employment on behalf of other employees. However, nothing in either Rodriguez' testimony or Kitler's indicates that Kitler ever told her not to complain about conditions of employment, either on her own behalf or on behalf of others. The record also does not establish that Kitler made any such statement to any other employee.

[5] The complaint does not allege that this remark violated the Act.

Complaint paragraph 4(b) alleges that Respondent, by Kitler, directed employees to make complaints about hours of work and other terms and conditions of employment only to supervisors. However, neither Rodriguez' testimony nor Kitler's establishes that Kitler ever said that employees could make complaints *only* to supervisors.

In the testimony quoted above, Kitler admitted that she reminded Rodriguez of the Respondent's "problem solving policy," also acknowledging that the policy directs employees to bring all of their issues to management. However, the record does not establish that Kitler said that employees only were permitted to bring their work-related complaints to management and I find that she did not.

Similarly, the record does not establish that either Kitler or the "problem solving policy" prohibited employees from discussing work-related matters among themselves or engaging in concerted action to make either management or the public aware of matters relating to terms and conditions of employment. I find that she did not.

The complaint does not allege the "problem solving policy" itself, or any part of it, to be unlawful or to include unlawful statements. In the absence of any evidence that this policy prohibited or discouraged employees from exercising their Section 7 rights, I will not assume the policy to be unlawful. If the policy itself does not violate the Act, there is no basis to conclude that Kitler's reference to it violated the Act.

Rodriguez testified that "Patricia Kitler said if someone wanted their scorecards, they would need to go through their supervisors." However, an employee's request to examine her scorecards is not a complaint about wages, hours or other working conditions, and no one reasonably would consider such a request to be a complaint.

Just as an employee's request to see the tax withholding forms or insurance forms she had signed, or even her performance appraisal does not amount to a complaint, and neither does a request to see the scorecards on which her bid ranking is based. Certainly, if an employee looks at any of these documents, there is a possibility she might complain that it was incorrect, but such speculation about what an employee might do does not change a request for information into a complaint about working conditions.

Moreover, the words which Rodriguez attributed to Kitler--that anyone wishing to see her scorecards would need to go through her supervisor--do not constitute a restriction on the way employees could complain about working conditions, and the words reasonably would not be interpreted as such a restriction. The supervisors are the custodians of the scorecards. Where else could an employee go to obtain a document except to the person who possessed it?

Kitler's words do not, on their face, interfere with, restrain or coerce employees in the exercise of Section 7 rights. However, the Government argues that they do when considered in context. The General Counsel's brief states:

> Rodriguez credibly testified that she discussed the National Labor Relations Board and that Kitler said that Rodriguez was not an elected representative of the employees. [Tr. 35–37]. Rodriguez and Kitler both testified that Rodriguez asserted that she was speaking on behalf of other employees, and that Kitler said that they were there to discuss Rodriguez's issues, and other employees would need to go to their supervisors. [Tr. 36–38, 202–203].Kitler additionally admitted that she reminded Rodriguez that Respondent has a problem-solving policy, and that Rodriguez replied that not everyone may be comfortable voicing their opinion. [Tr. 202–203].
>
> Taken together, it is undisputed that Rodriguez asserted in the meeting that she was speaking on behalf of other employees and that Kitler said, in essence, that they would only talk to Rodriguez about her own issues, and "others could do the same with their supervisors." Any reasonable employee would hear such a statement as a prohibition on raising issues with management on behalf of others, particularly when such a remark follows on the heels of being told that seeking employee comments about an issue of mutual concern, the annual shift bid, was unacceptable, even when done in the break room-a non-work area.

Contrary to the General Counsel's brief, I do not conclude that "any reasonable employee" "would understand Kitler's words to prohibit raising issues with management on behalf of other employees. Indeed, I believe such an interpretation would be strained and unreasonable.

Clearly, during the June 24, 2015 meeting, Rodriguez did claim to be speaking on behalf of other employees. Kitler asked Rodriguez to name the employees for whom she was speaking and, Rodriguez testified. "I refused to give her any names because I wasn't going to point people out."

Nonetheless, even in that context, it would not be reasonable to interpret Kitler's statements in the manner urged by the Government. For example, a statement that "they were there to discuss Rodriguez's issues, and other employees would need to go to their supervisors" describes the reason why the managers had called Rodriguez away from her work station and into this particular meeting.

Rodriguez had not initiated this meeting. She had not approached management saying "I want to speak to you about employees' concerns."Kitler's words, stating the purpose of this particular meeting, do not prohibit Rodriguez or any employee from raising concerns with management.

It may be noted that complaint paragraphs 4(a) and 4(b) attribute to Kitler two statements which contradict each other. Complaint paragraph 4(a) alleges that Kitler prohibited employees from complaining to management and paragraph 4(b) alleges that Kitler directed employees to make complaints *only* to supervisors, who are part of management.

However, the evidence does not establish that Kitler made either alleged statement explicitly. Instead, the Government argues that, *in context*, Kitler's words reasonably communicated these messages. The General Counsel's argument thus assumes a context in which it would be reasonable to interpret Kitler's words as giving these two contradictory instructions.

The government's brief asserts that Kitler told Rodriguez that "seeking employee comments about an issue of mutual concern" was unacceptable. However, that characterization is not accurate. Managers Kitler and Robleto did not prohibit Rodriguez from seeking other employees' views about working

conditions but only said that the *means* she used were unacceptable.

One of those means was using the computer system, designed to receive, store and organize information regarding customer complaints and dedicated to that purpose, as a means of communicating with other employees. The record does not establish that the Respondent allowed this system to be used for any purpose other than logging such customer information. Therefore, I conclude that it was not an "email system" as that term is used in *Purple Communications*, 361 NLRB No. 126 (December 11, 2014)[6] and employees did not have a Section 7 right to use it as a discussion board, even if they were not on working time.

The record does not establish any practice of employees using this system for anything other than its intended case management purpose and I find that no such practice existed.[7] That employees had not used the system for email should hardly be surprising because it was not suited for such a purpose. The system did not tell an employee "you have mail" or otherwise let the employee know about a message. Instead, Rodriguez had to post signs informing employees both that there was a message and its identifier number before they knew it existed or could find it.

The system had been designed for case management purposes, not for email, and it was miserably suited for this latter use. An employer does not violate the Act by telling an employee that she should not use a dedicated case management system as if it were email.

In addition to prohibiting Rodriguez from using the case management system to send messages to other employees, Respondent also told her that she could not post signs without first asking and receiving management permission. As noted above, neither complaint paragraph 4(a) nor 4(b) alleges that this prohibition, by Manager Robleto, violated the Act.[8] During June 24, 2015 meeting, Manager Robleto told Rodriguez that, by posting the signs on the walls without permission, she had violated the Respondent's no–solicitation policy. The complaint does not allege that Respondent promulgated or maintained an unlawful no–solicitation rule. However, the prohibition is relevant here because it is part of the context. The managers were not forbidding Rodriguez from communicating with other employees about working conditions or from bringing those concerns to management. Instead, they were telling her that the means she chose--using the computerized case management system and putting signs on the walls--were inappropriate.

Manager Kitler also reminded Rodriguez of the Respondent's "problem solving policy," which directed employees to bring their concerns to management. As noted above, the complaint does not allege that the Respondent's "problem solving policy" itself violated the Act. Rather, the General Counsel argues that Kitler's reference to it communicated the unlawful message that employees were not allowed to address workplace issues in other ways, notably by engaging in protected, concerted activity.

In the absence of evidence that the Respondent's "problem solving policy" either was unlawful on its face or discriminatorily applied, I will assume that it is lawful. Kitler's reference to a lawful policy could violate the Act if she threatened to apply it in a discriminatory manner to punish an employee for engaging in protected activities or to discourage others from doing so. However, the record does not establish that Kitler made any such threat and I find that she did not.

Additionally, for the reasons discussed above, I do not find that Kitler's statements, in context, communicated an unlawful message. In other words, applying an objective standard, I conclude that Kitler's words would not reasonably be understood to convey a message which interfered with, restrained or coerced employees in the exercise of their Section 7 rights.

Therefore, I recommend that the Board dismiss the allegations raised in complaint paragraphs 4(a) and 4(b).

Complaint Paragraph 5(a) and 5(b)

Complaint paragraph 5(a) alleges that on or about June 25, 2015, the Respondent, by Klea Jackson, at its Jacksonville, Florida call center, prohibited employees from talking to their coworkers about working conditions on company property. Complaint paragraph 5(b) alleges that on or about June 25, 2015, the Respondent, by Klea Jackson, at its Jacksonville, Florida call center, threatened employees with discharge if they talked to their coworkers about working conditions on company property. Respondent denies these allegations and also the conclusions that it thereby violated the Act.

The Respondent has admitted that Corporate Human Resources Manager Klea Jackson is its supervisor and agent. Jackson's office is in Atlanta, but on June 25, 2015, he was in Jacksonville. He and Employee Relations and Development Manager Kitler called Rodriguez to meet with them.

Jackson cautioned Rodriguez not to post signs on the walls without first obtaining permission, and warned her that doing could lead to her discharge. As noted above, an employer may prohibit the posting of signs on its walls, so long as it does not discriminate against signs pertaining to union or other protected, concerted activity. *Faurecia Exhaust Systems*.above. The complaint does not allege that Jackson's admonition to Rodriguez about posting signs violated the Act.

Rather, the complaint alleges that Jackson threatened employees with discharge if they talked to coworkers about working conditions while on company property. Rodriguez' testimony indicates that after Jackson told her not to post signs on company property without permission, he told her that employees could not discuss working conditions while on company property. However, it is not clear from Rodriguez' testimony how the subject shifted from her posting signs to employees discussing working conditions:

[6] Rather, it falls within the category of "other interactive electronic communications." See 361 NLRB No. 126, slip op. at 14, fn. 70.

[7] Kitler credibly testified that employees have access, during their breaks, to computers with internet connections. They use these computers for email and to access Facebook.

[8] An employer lawfully may prohibit the posting of material on its property, provided that it does not discriminate against material related to employees' protected, concerted activities. *Faurecia Exhaust Systems*, 353 NLRB 382 (2008); *Stevens Graphics, Inc.*, 339 NLRB 457 (2003). The record does not establish that Respondent allowed employees to post anything else on its walls and I conclude that it did not.

Q. BY MS. LEONARD: Okay. And do you recall how that meeting began?

A. Yes. Klea Jackson had told me that I was there to talk about the posters, that I had violated their company policy and they had a right to terminate me for it.

Q. Okay. Had you posted any other posters or flyers or anything since the previous posters on June 24th?

A. No.

Q. Did you respond to what Mr. Jackson said?

A. Yes.

Q. How did you respond?

A. Well, I argued my point that I wasn't violating company policy.

Q. Okay. Did you explain why you thought you weren't violating company policy?

A. Yes. I said that since I was doing it in the break room not during working time, that it wasn't a violation of their policy. And he stated that anywhere on their property was a violation of their company policy.

Q. Okay. Did he say anything in response to your point that you had done it not on working time?

A. Yes. Well, he said that any time on their property was work time.

Q. Okay. Did you respond to that?

A. Yes. I gave him an example of how he was incorrect. I told him that if we are on company property but in the break room, then it's not our working time; we are not actually on the phones, or however, it's not a working time. Or I told him also that if we are on the floor talking about other things, then, you know, we are allowed to talk about other things during our working time. There shouldn't be any reason why we can't talk about other things.

Q. What did Mr. Jackson say to that?

A. He said it didn't matter because it was their property. If I wanted to talk to the other employees about their working conditions, I could do it on my own time off their property.

Something about this testimony does not quite ring true, in my view, so it warrants a closer look. It appears that the subject under discussion somehow changed from the right of employees to post signs to the right of employees to discuss working conditions. If the conversation did not flow in a natural way from one subject to the other, it raises the possibility that Rodriguez' account might either be incomplete or inaccurate.

From Rodriguez' testimony, it appears that when Jackson told her not to post signs on company property, she raised as a defense that she did the posting on her own time. To that defense, a logical reply would be that the relevant issue was not when but where: If she posted the signs on company property, it did not matter when she did it.

In Rodriquez' account, Jackson did not give this rejoinder but instead said "that any time on their property was work time." If Jackson really gave that response, he conflated the issues of conduct "on company property" and "on working time." However, I am somewhat skeptical that Jackson, a human resources manager at the corporate level, would make that mistake.

According to Rodriguez, she then began to explain to him that he was mistaken to assume that all time spent on company property was "work time." Her testimony indicates that *Rodriguez*, not Jackson, shifted the subject from posting signs to employee discussions:

> I told him that if we are on company property but in the break room, then it's not our working time; we are not actually on the phones, or however, it's not a working time. Or I told him also that if we are on the floor talking about other things, then, you know, we are allowed to talk about other things during our working time. There shouldn't be any reason why we can't talk about other things.

Rodriguez' use of the words "or I told him" rather than "and I told him" suggests possible uncertainty in what she actually said. This possibility appears to be significant because, as discussed above, Rodriguez did have some difficulty remembering details.

Additionally, in Rodriguez' remark to Jackson, she referred only to talking about "other things" and not specifically about working conditions. However, according to Rodriguez, Jackson responded with a reference to working conditions. (She testified that he said if "I wanted to talk to the other employees *about their working conditions*, I could do it on my own time off their property.")

Rodriguez' testimony strikes me as contrived and I have some difficulty believing it. However, Jackson did not testify. The record does not indicate that he was unavailable and it would have been in Respondent's interest to call him as a witness. Accordingly, I will presume that had he testified, he would not have contradicted Rodriguez' testimony.

In a one-word answer, Kitler did deny *hearing* Jackson prohibit Rodriguez from discussing working conditions with other employees. However, the perfunctory flavor of the denial lessens its probative weight:

> Q. Did you hear Klea [Jackson] say anything that could be interpreted as prohibition against her discussing with co-workers wages, hours, or other terms and conditions of employment?
>
> A. No.

Kitler's testimony that she did not *hear* the alleged violative statement does not suffice as a substitute for Jackson's testimony that he did not *make* it. Although I have some reservations about crediting Rodriguez' testimony, the absence of a denial from Jackson outweighs those misgivings. Therefore, I credit Rodriguez' testimony and find that Jackson made the statement she attributed to him.[9]

[9] Rodriguez also testified that Jackson "said that we were a non-union workplace, so protected concerted activity didn't apply." Although it seems a bit unlikely for a senior human relations officer to make such a statement, Rodriguez described a "back and forth" conversation that culminated in Jackson taking offense when she suggested that he should use the computer in front of him to visit the Board's

Based on Rodriguez' testimony, I find that Jackson prohibited her from discussing working conditions with other employees on the Respondent's property. Further, I conclude that the statement reasonably would tend to chill employees in the exercise of their Section 7 rights. Respondent thereby violated Section 8(a)(1) of the Act as alleged in complaint paragraph 5(a). *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992).

According to Rodriguez, after Jackson made the statement that employees were not allowed to discuss working conditions while on company property, he further told her that she could choose to follow the Respondent's policy, or could leave, or could be terminated for violating the policy. Because he made this statement after announcing that employees could not discuss working conditions while on company property, an employee reasonably would understand "policy" to include this prohibition. Therefore, I find that the Respondent, by Jackson, did threaten employees with discharge if they talked with coworkers while on company property. This threat reasonably would tend to chill employees in the exercise of Section 7 rights. Therefore, I conclude that Respondent violated Section 8(a)(1) of the Act by the conduct alleged in complaint paragraph 5(b).

In sum, I recommend that the Board find that the Respondent violated the Act by the conduct alleged in complaint paragraphs 5(a) and 5(b).

REMEDY

Having violated the Act, the Respondent must remedy the violation by posting the Notice to Employees attached to this decision as Appendix A. The complaint does not allege and the record does not establish that Respondent imposed any discipline on Rodriguez or otherwise discriminated against any employee. In these circumstances, posting the notice for the required period and in the manner described below will remedy the violation.

CONCLUSIONS OF LAW

1. The Respondent, Interactive Communications International, Inc. d/b/a INCOMM, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by prohibiting an employee from discussing terms and conditions of employment with other employees at any time on the Respondent's property, and by threatening employees with discharge if the discussed terms and conditions of employment with other employees while on Respondent's property.

3. Respondent did not violate the Act in any other manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[10]

ORDER

The Respondent, Interactive Communications International, Inc. d/b/a INCOMM, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from discussing wages, hours or other terms and conditions of employment with other employees while on Respondent's property during nonworking time and threatening employees with discharge if they discussed wages, hours or other terms and conditions of employment with other employees while on Respondent's property during nonworking time.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days after service by the Region, post at its facilities in Jacksonville, Florida, copies of the attached notice marked "Appendix A."[11] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, noticed shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010). In the event that, during the pendency of these proceedings, the Respondent has gone out of business or clos7ed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 25, 2015. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the

website. This heated discussion may have prompted Jackson to make a statement he otherwise would not have made. Because Jackson did not testify, I credit Rodriguez and find that Jackson made the statements she attributed to him. However, the complaint does not allege that such statements violated the Act so I make no findings regarding their lawfulness.

[10] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

steps that the Respondent has taken to comply.

Dated Washington, D.C. March 22, 2016

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT prohibit employees from discussing wages, hours, or other terms and conditions of employment with other employees while on our property during nonworking time.

WE WILL NOT threaten employees with discharge if they discuss wages, hours, or other terms and conditions of employment with other employees while on our property during nonworking time.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

INTERACTIVE COMMUNICATIONS INTERNATIONAL, INC. D/B/A INCOMM

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12–CA–155362 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.